TAB F

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE: W. R. GRACE &	Chapter 11
COMPANY, ET AL.,	Case number 01-01139 (JFK)
Debtor,	Jointly Administered

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DEPOSITION OF
PROFESSOR JOHN C. IRVINE
10:35 a.m.
July 31, 2007
1740 Peachtree Street
Atlanta, Georgia
Colleen B. Seidl, RPR, CCR, CSR-B-1113
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A. Sale of wages and that kind of thing.
Q. Right. Replevin and so on.
Now, can you turn to the common law briefly?
A. It will have to be brief, because when I turn to the common law, I must confess that in the brief window of opportunity available to me, I have found nothing in the Canadian books. Perhaps with a little more diligent researching, I could.
But when I turn to the position in England, I find that the matter has been a matter of some discussion. The leading case, it appears to me to be a case in the English Court of Appeal in 1988. It is called Congregational Union against Harris, two r's and one s, and the reference to that case is 1988 one or England, page 15. It is an elaborate judgment involving three law lords -- well, not law lords, law justices of appeal who trace the history of this issue as best they can a long way.
It appears that some judges of an older generation still adhere to the view that I expressed briefly, while I was trying to think of an answer for the benefit of Mr. Cameron, that the burden of proof of bringing oneself within a defense is upon the defendant. And that is true of most defenses, but it

does appear that over the years attitudes certainly in the English court have changed. The issue has not been one of common occurrence. But the best explanation given, and it is not very elucidating, seems to be that of Sir Robin Buckley, who says that nowadays the burden of proof is upon the defendant to bring himself, no matter what the precise issue in relation to limitations, within the benefit of the statute by establishing a prima facie case.

Q. So you're saying traditionally the burden was on the plaintiff?

A. I'm sorry, I'm getting this wrong.

Q. You are mixing?

A. No, I'm confusing myself under pressure here.

Traditionally the burden of proof was upon the defendant, at least in the minds of some, to bring himself within the benefit of the defense. Nowadays it appears the burden of proof is upon the plaintiff -- thank you for correcting me on that -- to bring himself within the benefit of the statute of offense to show a prima facie case that he has brought his action in a timely fashion, whereupon the burden of proof shifts to the defendant to rebut that.

Quite how that works, I have not remotest idea, but that is what Sir Robin Buckley says and it is all, to tell you the truth, that I have been able to find.

the station so long that it will be too late if it is not too late already to make the kind of esoteric argument I've made.

I make a further concession. The argument

I based on Section 1-E does after all relate to a specific definition, that of an injury and the word injury does not occur in Section 3.3.B. So it may be that this argument could be regarded as a misuse of the definition section in this instance.

I merely raise the point, because it seemed to me that Mr. Cameron was after rather more than an obvious interpretation of 3.3.B; and since this rather academic argument is there, I thought it honest and necessary to raise it.

Q. No, quite right with respect to your trying to give your full understanding and explanation of the issue. But I want to just understand your process for a moment before we dissend more into details on the issue itself.

My understanding of your function as an expert in this case is to prove foreign law in a case according to conflicts of law principles.

A. No.

Q. No, no, not as an expert in conflicts of law, but when you're in a case where foreign law is becoming a substantive law of the case by normal conflicts of law principles, it's necessary for an expert from the foreign jurisdiction to prove foreign law and that that expert is to state what the law is.

And I think, as I understand what you are doing, Professor Irvine, and no doubt shrewdly and with your considerable imaginative and rational powers, what I think you're doing is analyzing what the law could be in the future or should be in the future.

But would you agree with me on this point that the law today as stated by the cases and as interpreted by the drafters of the legislation, the Alberta Law Reform Institute, that the law is as was stated by Mr. Cameron when he put the question to you; that is, the act or omission commences the ultimate limitation period and it does not have to wait for damage. Damage is irrelevant.

A. That is certainly the intendment of 3.3.B., but that is a very new provision. Its interpretation is still, though decreasingly, open to evaluation by the courts. I merely feel it necessary to raise any -- not for the future, but for now, any alternative interpretation which must be put on it because of its oddity, because of the curious way in which it seems entirely to supplant on its clear wording 3.1.B.

Q. You would agree with me, Professor Irvine, would you not, that Alberta is a very conservative

jurisdiction. They don't like litigation in that jurisdiction, isn't that true?

A. I never lived in Alberta. I wouldn't presume to generalize about their jurisdiction.

Q. Doesn't it have the most conservative class action legislation of any jurisdiction in the country?

A. I'm not an expert on class actions. I would defer to your views on that, sir. But I will say this, I don't want to be an advocate in this case, still less do I want to usurp the functions of a judge. So I'm very reluctant to do that. But if I had to be a betting man and as between the two interpretations I have put forward of Section 3.3.G, my own preference, because I happen to be a strict constructionist, would favor the way the case law appears at the moment to be developing.

But my views on that are of no real value, because no doubt due to the inscrutable workings of providence, I am not a judge.

Q. All right. I'm going to, because of time constraints, just very lightly point to some of these cases which I'm sure you have read.

The first is a Court of Appeal decision.

A. Of?

Q. An Alberta Court of Appeal decision, and bear with me for a second.

A. Is that a case called Mack?

Q. It's Meek.

order to commence the ultimate limitation period?

A. Well, I'm not going to concede that because it is not my job to concede that or to say what the law is. But I certainly agree with you that the train has left the station and appears to be headed in that direction as things stand at the present. There I think I must insist on leaving that issue.

Q. I don't want to leave the record that I said I was going to show you something in the December 1999 report and then not do it.

A. You kept your word to the letter.

Q. If we could just go to page 70 and in paragraph 47, a very short paragraph, "It is now glossing," paragraph or Section 3(b) and if you turn back a few pages, you'll see that on page 63 all this is called comment. This is comment on the draft legislation. And there under paragraph 47 on page 70

it states the following: "The ultimate period for a claim based on the breach of a duty may expire before the claim has even accrued for the damage may not have occurred by that time and even if it has, the claim may not have accrued under the discovery rule. This problem of legal principle is inescapable because there's no feasible alternative consistent with limitation policy."

It's very similar language to what we saw in both the cases and the previous report?

A. Once again I entirely agree with that

you said you were working on a new report and that you would bring it or give it the following Monday, which you did.

A. Which I did, indeed.

Q. That was Monday of this week.

A. Yes.

Q. So now I'm here wanting to examine you on that report.

A. Now I understand where we are.

Q. Fair enough. But you don't have anything that would help me. Were there other changes and so on, it would make it easier for me, I've tried to go and read the two reports side by side as you can appreciate, but --

A. Are we talking about the main opinion or?

Q. We're talking about both Appendix B where I understand you've made significant changes and also the main report, and I just want to make sure that I haven't missed anything, so maybe you could just help me. If I'm more pointed about it, are there any changes in the main report other than the page 25 in the original, which is now I believe page 26 in the new report. One would have expected there's other changes because the pagination has changed.

A. If there are any changes, I'm certain we

changed the font, which may have affected the pagination. I do not want to mislead you on this. My impression is that I made no further changes to the main body of the report which was in

Mr. Cameron's possession other than one, and I'm not sure, it must have been after we met, other than one amendment designed to reflect something which Mr. Cameron had pointed out to me which was in relation to the burden of proof issue again under the British Columbia statute.

Q. Okay. Well, I may have even missed that, so I would be grateful if we could -- have you got the report, the new report with you?

A. I have a version which I'm prepared to sign off on today.

Q. It's another?

A. No, this is it.

Q. This is the same one that you gave to your counsel and they gave to us on Monday?

A. I hope I'm correct. I was on the cusp, I must confess, because I like to get things right and I'm an academic unlettered in these proceedings. I was on the cusp of making another amendment friendly to Mr. Cameron's interest, but then having spoken to Bud about this and told him that I was trying to

produce a final clean copy, he said words to the effect, that for God's sake, don't change it anymore, even if you think it's wrong in some details. And I in fairness thought, well, that's right, because sooner or later Mr. Cameron and his team are entitled to a static rather than a moving target.

Q. Can I just question you on that for a

at page 47, "I think it is clear that all of the elements necessary to the plaintiff's cause of action came into existence during the period 1973 to 1975 when the MK3 was installed in the building. Accordingly, the limitation period began to run in or about the month of September 1975 when the installation was completed."

If you just drop down to paragraph 11, she comments on those first couple of sentences.

A. Yes.

Q. She says, "In this case, all of the elements necessary to the plaintiff's cause of action and on which its claim is founded, including constructing the building on organic soil without a proper foundation and the failure, if any, to tie the wall to the roof arose between the fall of 1971 and the spring of 1972. The plaintiff's actions was therefore statute barred before it commenced this action in March 1997, whether the limitation period was two or six years.

This is, of course, a case that is dealing with the so-called normal limitation period?

A. Yes.

Q. This is not a ULP, an ultimate limitation period case?

A. No.

Q. And I will get to some of those, but it seems to me that this case which refers to Privest,

it does so for good reason. The judge is suggesting that it's on all fours with that cases dealing with a building that has caused problems and has led to dangerous conditions. It's concerning a claim that

the construction was done poorly and the materials were poor and also that the inspection was not done right and, therefore, the building was occupied because of all of that to the detriment of the occupants and the owner of the building.

Do you see that? Am I being fair in that assessment?

A. Yes, I think that that is a reasonable summary of the issues in play, and you correctly point out there are two defendants. And on the analysis offered by Madame Justice L'Heureux-Dubé's here, it will be of no real matter given the facts, on those factual assumptions. Whether we're talking about the time of commencement of the limitation period for the inspector, the time of commencement of the limitation period for the contractors on those assumed facts.

Q. I'm not trying to suggest; though, I just want you to understand this. My point is not to make you agonize over these detailed facts, but if you want to take the time to reread the case. I'm simply trying to, given the shortness of the time, trying to underscore what I think are the main legal points that come out of this judgment.

A. And I thank you for that. Perhaps I won't

just have concerns, which I felt it fit to raise, because the issue is such an important one in terms of what the plaintiffs knew.

Q. But would you agree that Privest has never been disagreed with, any doubt cast on the case with respect to its conclusions on the Agents to Know issue?

A. I agree entirely.

Q. All right. And I want to also ask you this. Do you recall in reading the Privest case that Mr. Justice Drost decided that he did not even need to reach a conclusion with respect to the design professionals, the architects, engineers, specification writers' knowledge and whether or not that was as a matter of law implied to the building owners, because he found that the building owners had either actual or constructive knowledge? Do you recall in the decision?

A. Yes. I find that passage and his judgment admittedly rather difficult to follow. But in any case, that was not an aspect of the case in which I am particularly interested since it seems to me essentially an evidentiary point, what the plaintiffs knew and did not know and how they could be said to have known what they are supposed to have known, did

not primarily interest me. I was interested in the underlying doctrine of liability rather than the considerable province of proof, which you overcame in that case.

Q. Okay, fair enough. So just to round off this point. So with respect to his judgment on Johns Manville, the Canadian Indemnity versus Johns Manville decision of the Supreme Court of Canada and its finding on the fact that in the insurance industry, there was notoriety about the asbestos controversy, and Justice Drost then applies that, he says, to building developers.

A. He's saying it was an analogy, yes.

Q. He actually says he's applying -- that's an issue of law, is it not?

A. He's saying the same principles of law which fixed knowledge in the insurance underwriter in that case, a case with which it would be very difficult to disagree in fact.

Q. Right.

A. Should in his view conduce to the same result in relation to the -- my mind is failing -- in relation to the contractors and, indeed, the building owners in this case, yes, in Privest.

Q. Right. And I take it that you haven't

tried to analyze that. You don't disagree with that?

A. I don't disagree with that at all. I don't know whether it's right or wrong, but it was a finding he was perfectly entitled to make.

MR. FAIREY: I think you have about 14 minutes.

MR. HAYLEY: That's what I thought, too.

Can you give me a moment and if you want to just have a minute break, I'll see if I can wind up well within our time frame. Not that I wouldn't like to spend more time with you, Professor Irvine, and your interesting views.

Q. (By Mr. Hayley) I noted that in reading your new report that you had made some changes in light of your thought process and even in light of the last deposition, as I understand it.

A. In relation, yes, very, very slight ones, in deference to points validly made by Mr. Cameron. Yes, very small.

Q. But you didn't give any acknowledgment to Professor Buzbee and I'm wondering why that was the case. Wasn't she the person that you said had got you onto your idea of the tolling of limitation periods via the Class Proceeding Acts?

A. No, that wasn't, I think, what I intended

to say.

I intended to say when the idea did occur to me, and it isn't a particularly obscure idea, I had after all been involved not as an author, but as a signer to the Manitoba Law Reform Commission Report on class actions, I thought I would indeed have a consultation with a colleague about this and determine whether there was indeed an issue here and in no very profound way, but as a colleague does, she said a few things to me about it. And the result is that the report is -- as I say, I raised the issue.